

AMENDED IN SENATE AUGUST 24, 2012

AMENDED IN ASSEMBLY APRIL 25, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2386

Introduced by Assembly Member Allen
(Coauthor: Assembly Member Bonnie Lowenthal)
(Coauthor: Senator Evans)

February 24, 2012

An act to amend Section 12926 of the Government Code, relating to discrimination.

LEGISLATIVE COUNSEL'S DIGEST

AB 2386, as amended, Allen. Employment and housing discrimination: sex: breastfeeding.

Under the California Fair Employment and Housing Act, it is unlawful to engage in specified discriminatory practices in employment or housing accommodations on the basis of sex. Under existing law, "sex," for purposes of the act, includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth.

This bill would provide that, for purposes of the act, the term "sex" also includes breastfeeding or medical conditions related to breastfeeding. This bill would also state that the changes made by this bill to the above provisions are declaratory of existing law.

This bill would incorporate additional changes in Section 12926 of the Government Code proposed by AB 1964, that would become operative only if AB 1964 and this bill are both chaptered and become effective on or before January 1, 2013, and this bill is chaptered last.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12926 of the Government Code is
2 amended to read:
3 12926. As used in this part in connection with unlawful
4 practices, unless a different meaning clearly appears from the
5 context:
6 (a) “Affirmative relief” or “prospective relief” includes the
7 authority to order reinstatement of an employee, awards of backpay,
8 reimbursement of out-of-pocket expenses, hiring, transfers,
9 reassignments, grants of tenure, promotions, cease and desist
10 orders, posting of notices, training of personnel, testing, expunging
11 of records, reporting of records, and any other similar relief that
12 is intended to correct unlawful practices under this part.
13 (b) “Age” refers to the chronological age of any individual who
14 has reached his or her 40th birthday.
15 (c) “Employee” does not include any individual employed by
16 his or her parents, spouse, or child, or any individual employed
17 under a special license in a nonprofit sheltered workshop or
18 rehabilitation facility.
19 (d) “Employer” includes any person regularly employing five
20 or more persons, or any person acting as an agent of an employer,
21 directly or indirectly, the state or any political or civil subdivision
22 of the state, and cities, except as follows:
23 “Employer” does not include a religious association or
24 corporation not organized for private profit.
25 (e) “Employment agency” includes any person undertaking for
26 compensation to procure employees or opportunities to work.
27 (f) “Essential functions” means the fundamental job duties of
28 the employment position the individual with a disability holds or
29 desires. “Essential functions” does not include the marginal
30 functions of the position.
31 (1) A job function may be considered essential for any of several
32 reasons, including, but not limited to, any one or more of the
33 following:
34 (A) The function may be essential because the reason the
35 position exists is to perform that function.

1 (B) The function may be essential because of the limited number
2 of employees available among whom the performance of that job
3 function can be distributed.

4 (C) The function may be highly specialized, so that the
5 incumbent in the position is hired for his or her expertise or ability
6 to perform the particular function.

7 (2) Evidence of whether a particular function is essential
8 includes, but is not limited to, the following:

9 (A) The employer's judgment as to which functions are essential.

10 (B) Written job descriptions prepared before advertising or
11 interviewing applicants for the job.

12 (C) The amount of time spent on the job performing the function.

13 (D) The consequences of not requiring the incumbent to perform
14 the function.

15 (E) The terms of a collective bargaining agreement.

16 (F) The work experiences of past incumbents in the job.

17 (G) The current work experience of incumbents in similar jobs.

18 (g) (1) "Genetic information" means, with respect to any
19 individual, information about any of the following:

20 (A) The individual's genetic tests.

21 (B) The genetic tests of family members of the individual.

22 (C) The manifestation of a disease or disorder in family members
23 of the individual.

24 (2) "Genetic information" includes any request for, or receipt
25 of, genetic services, or participation in clinical research that
26 includes genetic services, by an individual or any family member
27 of the individual.

28 (3) "Genetic information" does not include information about
29 the sex or age of any individual.

30 (h) "Labor organization" includes any organization that exists
31 and is constituted for the purpose, in whole or in part, of collective
32 bargaining or of dealing with employers concerning grievances,
33 terms or conditions of employment, or of other mutual aid or
34 protection.

35 (i) "Medical condition" means either of the following:

36 (1) Any health impairment related to or associated with a
37 diagnosis of cancer or a record or history of cancer.

38 (2) Genetic characteristics. For purposes of this section, "genetic
39 characteristics" means either of the following:

1 (A) Any scientifically or medically identifiable gene or
2 chromosome, or combination or alteration thereof, that is known
3 to be a cause of a disease or disorder in a person or his or her
4 offspring, or that is determined to be associated with a statistically
5 increased risk of development of a disease or disorder, and that is
6 presently not associated with any symptoms of any disease or
7 disorder.

8 (B) Inherited characteristics that may derive from the individual
9 or family member, that are known to be a cause of a disease or
10 disorder in a person or his or her offspring, or that are determined
11 to be associated with a statistically increased risk of development
12 of a disease or disorder, and that are presently not associated with
13 any symptoms of any disease or disorder.

14 (j) “Mental disability” includes, but is not limited to, all of the
15 following:

16 (1) Having any mental or psychological disorder or condition,
17 such as ~~mental retardation~~ *intellectual disability*, organic brain
18 syndrome, emotional or mental illness, or specific learning
19 disabilities, that limits a major life activity. For purposes of this
20 section:

21 (A) “Limits” shall be determined without regard to mitigating
22 measures, such as medications, assistive devices, or reasonable
23 accommodations, unless the mitigating measure itself limits a
24 major life activity.

25 (B) A mental or psychological disorder or condition limits a
26 major life activity if it makes the achievement of the major life
27 activity difficult.

28 (C) “Major life activities” shall be broadly construed and shall
29 include physical, mental, and social activities and working.

30 (2) Any other mental or psychological disorder or condition not
31 described in paragraph (1) that requires special education or related
32 services.

33 (3) Having a record or history of a mental or psychological
34 disorder or condition described in paragraph (1) or (2), which is
35 known to the employer or other entity covered by this part.

36 (4) Being regarded or treated by the employer or other entity
37 covered by this part as having, or having had, any mental condition
38 that makes achievement of a major life activity difficult.

39 (5) Being regarded or treated by the employer or other entity
40 covered by this part as having, or having had, a mental or

1 psychological disorder or condition that has no present disabling
2 effect, but that may become a mental disability as described in
3 paragraph (1) or (2).

4 “Mental disability” does not include sexual behavior disorders,
5 compulsive gambling, kleptomania, pyromania, or psychoactive
6 substance use disorders resulting from the current unlawful use of
7 controlled substances or other drugs.

8 (k) “On the bases enumerated in this part” means or refers to
9 discrimination on the basis of one or more of the following: race,
10 religious creed, color, national origin, ancestry, physical disability,
11 mental disability, medical condition, genetic information, marital
12 status, sex, age, or sexual orientation.

13 (l) “Physical disability” includes, but is not limited to, all of the
14 following:

15 (1) Having any physiological disease, disorder, condition,
16 cosmetic disfigurement, or anatomical loss that does both of the
17 following:

18 (A) Affects one or more of the following body systems:
19 neurological, immunological, musculoskeletal, special sense
20 organs, respiratory, including speech organs, cardiovascular,
21 reproductive, digestive, genitourinary, hemic and lymphatic, skin,
22 and endocrine.

23 (B) Limits a major life activity. For purposes of this section:

24 (i) “Limits” shall be determined without regard to mitigating
25 measures such as medications, assistive devices, prosthetics, or
26 reasonable accommodations, unless the mitigating measure itself
27 limits a major life activity.

28 (ii) A physiological disease, disorder, condition, cosmetic
29 disfigurement, or anatomical loss limits a major life activity if it
30 makes the achievement of the major life activity difficult.

31 (iii) “Major life activities” shall be broadly construed and
32 includes physical, mental, and social activities and working.

33 (2) Any other health impairment not described in paragraph (1)
34 that requires special education or related services.

35 (3) Having a record or history of a disease, disorder, condition,
36 cosmetic disfigurement, anatomical loss, or health impairment
37 described in paragraph (1) or (2), which is known to the employer
38 or other entity covered by this part.

1 (4) Being regarded or treated by the employer or other entity
2 covered by this part as having, or having had, any physical
3 condition that makes achievement of a major life activity difficult.

4 (5) Being regarded or treated by the employer or other entity
5 covered by this part as having, or having had, a disease, disorder,
6 condition, cosmetic disfigurement, anatomical loss, or health
7 impairment that has no present disabling effect but may become
8 a physical disability as described in paragraph (1) or (2).

9 (6) “Physical disability” does not include sexual behavior
10 disorders, compulsive gambling, kleptomania, pyromania, or
11 psychoactive substance use disorders resulting from the current
12 unlawful use of controlled substances or other drugs.

13 (m) Notwithstanding subdivisions (j) and (l), if the definition
14 of “disability” used in the federal Americans with Disabilities Act
15 of 1990 (P.L. 101-336) would result in broader protection of the
16 civil rights of individuals with a mental disability or physical
17 disability, as defined in subdivision (j) or (l), or would include any
18 medical condition not included within those definitions, then that
19 broader protection or coverage shall be deemed incorporated by
20 reference into, and shall prevail over conflicting provisions of, the
21 definitions in subdivisions (j) and (l).

22 (n) “Race, religious creed, color, national origin, ancestry,
23 physical disability, mental disability, medical condition, genetic
24 information, marital status, sex, age, or sexual orientation” includes
25 a perception that the person has any of those characteristics or that
26 the person is associated with a person who has, or is perceived to
27 have, any of those characteristics.

28 (o) “Reasonable accommodation” may include either of the
29 following:

30 (1) Making existing facilities used by employees readily
31 accessible to, and usable by, individuals with disabilities.

32 (2) Job restructuring, part-time or modified work schedules,
33 reassignment to a vacant position, acquisition or modification of
34 equipment or devices, adjustment or modifications of examinations,
35 training materials or policies, the provision of qualified readers or
36 interpreters, and other similar accommodations for individuals
37 with disabilities.

38 (p) “Religious creed,” “religion,” “religious observance,”
39 “religious belief,” and “creed” include all aspects of religious
40 belief, observance, and practice.

1 (q) (1) “Sex” includes, but is not limited to, the following:

2 (A) Pregnancy or medical conditions related to pregnancy.

3 (B) Childbirth or medical conditions related to childbirth.

4 (C) Breastfeeding or medical conditions related to breastfeeding.

5 (2) “Sex” also includes, but is not limited to, a person’s gender.

6 “Gender” means sex, and includes a person’s gender identity and
7 gender expression. “Gender expression” means a person’s
8 gender-related appearance and behavior whether or not
9 stereotypically associated with the person’s assigned sex at birth.

10 (r) “Sexual orientation” means heterosexuality, homosexuality,
11 and bisexuality.

12 (s) “Supervisor” means any individual having the authority, in
13 the interest of the employer, to hire, transfer, suspend, layoff, recall,
14 promote, discharge, assign, reward, or discipline other employees,
15 or the responsibility to direct them, or to adjust their grievances,
16 or effectively to recommend that action, if, in connection with the
17 foregoing, the exercise of that authority is not of a merely routine
18 or clerical nature, but requires the use of independent judgment.

19 (t) “Undue hardship” means an action requiring significant
20 difficulty or expense, when considered in light of the following
21 factors:

22 (1) The nature and cost of the accommodation needed.

23 (2) The overall financial resources of the facilities involved in
24 the provision of the reasonable accommodations, the number of
25 persons employed at the facility, and the effect on expenses and
26 resources or the impact otherwise of these accommodations upon
27 the operation of the facility.

28 (3) The overall financial resources of the covered entity, the
29 overall size of the business of a covered entity with respect to the
30 number of employees, and the number, type, and location of its
31 facilities.

32 (4) The type of operations, including the composition, structure,
33 and functions of the workforce of the entity.

34 (5) The geographic separateness, administrative, or fiscal
35 relationship of the facility or facilities.

36 *SEC. 1.5. Section 12926 of the Government Code is amended*
37 *to read:*

38 12926. As used in this part in connection with unlawful
39 practices, unless a different meaning clearly appears from the
40 context:

1 (a) “Affirmative relief” or “prospective relief” includes the
2 authority to order reinstatement of an employee, awards of backpay,
3 reimbursement of out-of-pocket expenses, hiring, transfers,
4 reassignments, grants of tenure, promotions, cease and desist
5 orders, posting of notices, training of personnel, testing, expunging
6 of records, reporting of records, and any other similar relief that
7 is intended to correct unlawful practices under this part.

8 (b) “Age” refers to the chronological age of any individual who
9 has reached his or her 40th birthday.

10 (c) “Employee” does not include any individual employed by
11 his or her parents, spouse, or child, or any individual employed
12 under a special license in a nonprofit sheltered workshop or
13 rehabilitation facility.

14 (d) “Employer” includes any person regularly employing five
15 or more persons, or any person acting as an agent of an employer,
16 directly or indirectly, the state or any political or civil subdivision
17 of the state, and cities, except as follows:

18 “Employer” does not include a religious association or
19 corporation not organized for private profit.

20 (e) “Employment agency” includes any person undertaking for
21 compensation to procure employees or opportunities to work.

22 (f) “Essential functions” means the fundamental job duties of
23 the employment position the individual with a disability holds or
24 desires. “Essential functions” does not include the marginal
25 functions of the position.

26 (1) A job function may be considered essential for any of several
27 reasons, including, but not limited to, any one or more of the
28 following:

29 (A) The function may be essential because the reason the
30 position exists is to perform that function.

31 (B) The function may be essential because of the limited number
32 of employees available among whom the performance of that job
33 function can be distributed.

34 (C) The function may be highly specialized, so that the
35 incumbent in the position is hired for his or her expertise or ability
36 to perform the particular function.

37 (2) Evidence of whether a particular function is essential
38 includes, but is not limited to, the following:

39 (A) The employer’s judgment as to which functions are essential.

1 (B) Written job descriptions prepared before advertising or
2 interviewing applicants for the job.

3 (C) The amount of time spent on the job performing the function.

4 (D) The consequences of not requiring the incumbent to perform
5 the function.

6 (E) The terms of a collective bargaining agreement.

7 (F) The work experiences of past incumbents in the job.

8 (G) The current work experience of incumbents in similar jobs.

9 (g) (1) “Genetic information” means, with respect to any
10 individual, information about any of the following:

11 (A) The individual’s genetic tests.

12 (B) The genetic tests of family members of the individual.

13 (C) The manifestation of a disease or disorder in family members
14 of the individual.

15 (2) “Genetic information” includes any request for, or receipt
16 of, genetic services, or participation in clinical research that
17 includes genetic services, by an individual or any family member
18 of the individual.

19 (3) “Genetic information” does not include information about
20 the sex or age of any individual.

21 (h) “Labor organization” includes any organization that exists
22 and is constituted for the purpose, in whole or in part, of collective
23 bargaining or of dealing with employers concerning grievances,
24 terms or conditions of employment, or of other mutual aid or
25 protection.

26 (i) “Medical condition” means either of the following:

27 (1) Any health impairment related to or associated with a
28 diagnosis of cancer or a record or history of cancer.

29 (2) Genetic characteristics. For purposes of this section, “genetic
30 characteristics” means either of the following:

31 (A) Any scientifically or medically identifiable gene or
32 chromosome, or combination or alteration thereof, that is known
33 to be a cause of a disease or disorder in a person or his or her
34 offspring, or that is determined to be associated with a statistically
35 increased risk of development of a disease or disorder, and that is
36 presently not associated with any symptoms of any disease or
37 disorder.

38 (B) Inherited characteristics that may derive from the individual
39 or family member, that are known to be a cause of a disease or
40 disorder in a person or his or her offspring, or that are determined

1 to be associated with a statistically increased risk of development
2 of a disease or disorder, and that are presently not associated with
3 any symptoms of any disease or disorder.

4 (j) “Mental disability” includes, but is not limited to, all of the
5 following:

6 (1) Having any mental or psychological disorder or condition,
7 such as ~~mental retardation~~ *intellectual disability*, organic brain
8 syndrome, emotional or mental illness, or specific learning
9 disabilities, that limits a major life activity. For purposes of this
10 section:

11 (A) “Limits” shall be determined without regard to mitigating
12 measures, such as medications, assistive devices, or reasonable
13 accommodations, unless the mitigating measure itself limits a
14 major life activity.

15 (B) A mental or psychological disorder or condition limits a
16 major life activity if it makes the achievement of the major life
17 activity difficult.

18 (C) “Major life activities” shall be broadly construed and shall
19 include physical, mental, and social activities and working.

20 (2) Any other mental or psychological disorder or condition not
21 described in paragraph (1) that requires special education or related
22 services.

23 (3) Having a record or history of a mental or psychological
24 disorder or condition described in paragraph (1) or (2), which is
25 known to the employer or other entity covered by this part.

26 (4) Being regarded or treated by the employer or other entity
27 covered by this part as having, or having had, any mental condition
28 that makes achievement of a major life activity difficult.

29 (5) Being regarded or treated by the employer or other entity
30 covered by this part as having, or having had, a mental or
31 psychological disorder or condition that has no present disabling
32 effect, but that may become a mental disability as described in
33 paragraph (1) or (2).

34 “Mental disability” does not include sexual behavior disorders,
35 compulsive gambling, kleptomania, pyromania, or psychoactive
36 substance use disorders resulting from the current unlawful use of
37 controlled substances or other drugs.

38 (k) “On the bases enumerated in this part” means or refers to
39 discrimination on the basis of one or more of the following: race,
40 religious creed, color, national origin, ancestry, physical disability,

1 mental disability, medical condition, genetic information, marital
2 status, sex, age, or sexual orientation.

3 (l) "Physical disability" includes, but is not limited to, all of the
4 following:

5 (1) Having any physiological disease, disorder, condition,
6 cosmetic disfigurement, or anatomical loss that does both of the
7 following:

8 (A) Affects one or more of the following body systems:
9 neurological, immunological, musculoskeletal, special sense
10 organs, respiratory, including speech organs, cardiovascular,
11 reproductive, digestive, genitourinary, hemic and lymphatic, skin,
12 and endocrine.

13 (B) Limits a major life activity. For purposes of this section:

14 (i) "Limits" shall be determined without regard to mitigating
15 measures such as medications, assistive devices, prosthetics, or
16 reasonable accommodations, unless the mitigating measure itself
17 limits a major life activity.

18 (ii) A physiological disease, disorder, condition, cosmetic
19 disfigurement, or anatomical loss limits a major life activity if it
20 makes the achievement of the major life activity difficult.

21 (iii) "Major life activities" shall be broadly construed and
22 includes physical, mental, and social activities and working.

23 (2) Any other health impairment not described in paragraph (1)
24 that requires special education or related services.

25 (3) Having a record or history of a disease, disorder, condition,
26 cosmetic disfigurement, anatomical loss, or health impairment
27 described in paragraph (1) or (2), which is known to the employer
28 or other entity covered by this part.

29 (4) Being regarded or treated by the employer or other entity
30 covered by this part as having, or having had, any physical
31 condition that makes achievement of a major life activity difficult.

32 (5) Being regarded or treated by the employer or other entity
33 covered by this part as having, or having had, a disease, disorder,
34 condition, cosmetic disfigurement, anatomical loss, or health
35 impairment that has no present disabling effect but may become
36 a physical disability as described in paragraph (1) or (2).

37 (6) "Physical disability" does not include sexual behavior
38 disorders, compulsive gambling, kleptomania, pyromania, or
39 psychoactive substance use disorders resulting from the current
40 unlawful use of controlled substances or other drugs.

(m) Notwithstanding subdivisions (j) and (l), if the definition of “disability” used in the federal Americans with Disabilities Act of 1990 (P.L. 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (l), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (l).

(n) “Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation” includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(o) “Reasonable accommodation” may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(p) “Religious creed,” “religion,” “religious observance,” “religious belief,” and “creed” include all aspects of religious belief, observance, and practice, *including religious dress and grooming practices. “Religious dress practice” shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. “Religious grooming practice” shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed.*

(q) (1) “Sex” includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) “Sex” ~~includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.~~ “Sex” also includes, but is not limited to, a person’s gender. “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.

(r) “Sexual orientation” means heterosexuality, homosexuality, and bisexuality.

(s) “Supervisor” means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(t) “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

SEC. 2. The amendment of Section 12926 of the Government Code made by this act does not constitute a change in, but is declaratory of, existing law.

SEC. 3. *Section 1.5 of this bill incorporates amendments to Section 12926 of the Government Code proposed by both this bill and Assembly Bill 1964. It shall only become operative if (1) both bills are enacted and become effective on or before January 1,*

- 1 2013, (2) each bill amends Section 12926 of the Government Code,
- 2 and (3) this bill is enacted after Assembly Bill 1964, in which case
- 3 Section 1 of this bill shall not become operative.

O